

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
)	
Second Periodic Review of the)	MB Docket No. 03-15
Commission's Rules and Policies)	
Affecting the Conversion)	RM 9832
To Digital Television)	
)	
 To: The Commission		

COMMENTS OF BLOCK COMMUNICATIONS, INC.

Block Communications, Inc. ("Block"), by its attorneys, submits herewith its comments in response to the Commission's Notice of Proposed Rule Making¹ regarding its review of various digital television transition and implementation matters. Through wholly-owned subsidiaries, Block owns or has an attributable interest in five television broadcast stations in small and middle-market communities across the country.² Block appreciates the opportunity to contribute to this important proceeding and most of all wishes to convey some practical aspects of the impact of the DTV transition on small- and middle-market stations that it hopes will assist the Commission in its decision-making.

¹ Second Periodic Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television, MB Docket No. 03-15, *Notice of Proposed Rule Making*, FCC 03-8 (rel. Jan. 27, 2003) ("*Notice*"). The comment date was extended to April 21, 2003. *See Order* in MB Docket No. 03-15, DA 03-872 (rel. Mar. 26, 2003).

² KTRV(TV) (Nampa, Idaho); WAND-TV (Decatur, Illinois); WDRB-TV (Louisville, Kentucky); WFTE(TV) (Salem, Indiana); and WLIO-TV (Lima, Ohio).

I. THE COMMISSION MUST INTERPRET SECTION 309(j)(14) TO ENSURE THAT AS FEW TELEVISION VIEWERS AS POSSIBLE LOSE OVER-THE-AIR SERVICE.

The Commission has requested comment on the proper interpretation of Section 309(j)(14)(B)(iii)'s requirement that the Commission extend the DTV transition beyond December 31, 2006 in any community where 15% of viewers have no access to DTV either over-the-air or through an MVPD (the "15% Test").³ Block believes that this test must be interpreted to vindicate Congress's intention that the vast majority of viewers receive continuous and unimpaired television service throughout the transition and beyond. As it establishes the parameters of the 15% Test, the Commission also must keep in mind that the legislative history of Section 309(j)(14)(B)(iii) shows that Congress was especially concerned with the continuity of over-the-air broadcast television service,⁴ and the fact that over 30% of the televisions in use today receive over-the-air service. Accordingly, the Commission should adopt its construction of Section 309(14)(B)(iii) to permit extensions of the DTV transition where 15% or more of viewers do not receive DTV service either over-the-air or through an MVPD. In determining which television households satisfy the statute, the Commission should recognize the political consequences of the loss service to even 15% of households at the close of the transition, and should account in some way for households with multiple analog receivers. The Commission also should include among those considered to receive DTV service only MVPD subscribers who receive the requisite DTV signals in their digital format prior to the close of the transition.

³ 47 U.S.C. § 309(j)(14)(B)(iii).

⁴ Balanced Budget Act of 1997, 105th Cong., 1st Sess. Conf. Rep. 105-217 (1997) (Congress' primary goal in enacting the 85% threshold was ensuring that "a significant number of consumers in any given market are not left without broadcast television service as of January 1, 2007."). *See also, Notice*, ¶ 89.

A. Section 309(j)(14)(B)(iii) Requires a Full and Fair Count and a Clear Showing That 85% of Viewers Are Capable of Receiving DTV Service.

The Commission asks whether the purpose of the 15% service-loss threshold is to ensure that viewers retain access to broadcast service or that the DTV transition ends, or both.⁵ The answer to this question is that Congress intended that the transition occur by December 31, 2006, but only on certain terms. Accordingly, Block concurs with the Commission that the statute requires a full and fair reckoning of whether 85% of viewers in a given market are capable of receiving DTV signals either over-the air via a digital tuner or digital-to-analog converter,⁶ or via an MVPD that carries all the DTV signals broadcast in the market.⁷ The statute demands no more, and can be satisfied by no less. If such a count shows that less than 85% of viewers in such market have access to DTV signals, then the Commission is not permitted to allow the transition to end.⁸

Block, like other broadcasters, has no interest in seeing the transition stretch long past December 31, 2006. No broadcaster wishes to be saddled indefinitely with the substantial costs of dual operation. Nonetheless, Block retains the responsibility to serve its communities of license, and maintains a special duty to its viewers who receive service over the air. Given Congress's primary concern with fostering viewers' ability to receive over-the-air DTV signals,

⁵ Notice, ¶ 89.

⁶ 47 U.S.C. § 309(j)(14)(B)(iii)(I).

⁷ 47 U.S.C. § 309(j)(14)(B)(iii)(II).

⁸ Indeed, Congress did not set the bar for the end of the transition unreachably high. Some members of Congress have expressed skepticism that the transition will be permitted to end even when the 85% threshold has been reached. *See, e.g., Tauzin DTV Plan Comes Under Fire*, ELECTRONIC MEDIA ONLINE, Sept.25, 2003, available at <http://www.tvweek.com/news/web092502.html> (describing Congressional reluctance to cut off DTV service to analog viewers even after 85% threshold is reached).

and the fact that over 30% of televisions in use receive only over-the-air signals,⁹ the Commission must avoid construing the 15% Test in a way that ends the transition before the vast majority of viewers are able to view DTV signals. At the same time, however, given the strains that dual operations will place on broadcasters, the Commission must ensure that it does not erect barriers so high that the transition cannot end.

B. The Commission Should Carefully Construe Which MVPD Viewers Have Sufficient Access to DTV Service.

One reasonable means of ensuring that the 15% Test does not artificially accelerate or decelerate the transition is to carefully construe the provision allowing MVPD subscribers to count towards the 85% threshold. For example, Block concurs with the Commission proposal that to satisfy the 15% Test, MVPD subscribers must be capable of viewing the digital signals they receive.¹⁰ Under this proposal, to satisfy the 15% Test, MVPD viewers would be required to receive digital signals over cable either through an integrated DTV tuner, a digital set-top box, or a digital-to-analog set top box.¹¹ The Commission should confirm that viewers who subscribe to an MVPD that carries the requisite DTV broadcast signals must also be able to view those signals to count towards satisfaction of the 15% Test.

Block believes that under the FCC's current rules, before each market reaches 85% penetration of over-the-air DTV receivers, cable operators retain a wide discretion over how to proceed with carriage of broadcasters' DTV signals. Until over-the-air DTV penetration reaches

⁹ Review of the Commission's Rules and Policies Affecting the Conversion To Digital Television, *Second Report And Order and Second Memorandum Opinion And Order*, 17 FCC Rcd 15978, ¶ 34 (2002).

¹⁰ *Notice*, ¶ 89.

¹¹ *See id.*

85% or until the Commission institutes some DTV carriage requirement, cable operators are free to carry or not to carry broadcast DTV signals pursuant to agreement between the parties. Based on the plain meaning of the statute, only viewers that subscribe to a cable system that has reached such carriage agreements or that carries broadcast DTV signals pursuant to some future Commission rule can count towards satisfying the 15% Test.

The Commission also should clarify that only MVPD viewers who subscribe to operators which carry all DTV signals broadcasting in a market *prior to the end of the DTV transition* will count towards the 85% threshold. The plain language of Section 309(j)(14)(B)(iii)(I) requires that to be considered receiving DTV service, an MVPD subscriber must, at the time of inquiry, already be receiving via the MVPD each of the digital broadcast signals being broadcast in the viewer's market. During this period, MVPDs will retain whatever must-carry obligations they currently have for broadcasters' analog signals. Consequently, under current Commission rules, if MVPD viewers are to be counted as receiving DTV service, their MVPDs will be required to carry both the analog and digital channels of stations in their markets for some period of time prior to the end of the transition. The Commission should further clarify that MVPD viewers will not satisfy this test merely by subscribing to an MVPD that currently is discharging its statutory must-carry duties by carrying a station's analog signal, even if that MVPD would be required to carry those stations' DTV signals after the transition is complete. Broadcasters recently have begun to speak out regarding the limited levels of DTV carriage on most MVPDs.¹² Indeed, given current levels of DTV carriage by MVPDs, few, if any, MVPD subscribers would count towards the 85% threshold based on their MVPD subscriptions.

¹² See, e.g., Letter from Association of Public Television Stations, the Corporation for Public Broadcasting, and the Public Broadcasting System, to Chairman Michael Powell, CS

The Commission also should not count MVPD viewers that receive service from a cable system that downconverts DTV signals to analog at the cable headend.¹³ These cable systems are not, in any sense, providing DTV service to customers. The Commission should make clear that simply receiving a broadcaster's DTV signal from an MVPD is not enough for a viewer to count towards the 85% threshold. As described above, viewers must receive broadcasters' DTV signals in their digital format before they can be counted in satisfaction of the 15% Test. If viewers choose to employ a digital-to-analog converter to view the digital signal in analog, they still may count toward satisfaction of the test, but they must initially receive the signal in digital format.

II. THE COMMISSION SHOULD NOT STRAY FROM ITS FLEXIBLE DTV POLICIES TOWARD SMALLER-MARKET STATIONS.

A. The Commission Should Defer Imposing a Replication/Maximization Deadline.

Recognizing the disproportionate burden that the implementation of DTV has placed on smaller-market stations, the Commission specifically has relaxed a number of DTV requirements, greatly facilitating the DTV transition. Part of this success has been the Commission's decision to reduce stations economic burden by allowing them to defer construction of full DTV facilities and instead building "low power" operations that still reach central communities where most people live.¹⁴ In the *Notice*, the Commission proposes

Docket Nos. 98-120, 00-96, 00-2, filed February 27, 2003 (describing recent must-carry proposal from public television stations and describing the pace of adoption of DTV as "glacial").

¹³ See *Notice*, ¶ 89.

¹⁴ Review of the Commission's Rules and Policies Affecting the Conversion To Digital Television, MM Docket No. 00-39, *Memorandum Opinion and Order on Reconsideration*, 16 FCC Rcd 20594, ¶¶ 11, 34-36 (2001).

deadlines – July 1, 2005 for top-four affiliates in markets 1-100 and July 1, 2006 for the rest – by which commercial stations must build-out full facilities and replicate and/or maximize their service areas.¹⁵

Block encourages the Commission to defer establishing these rigid deadlines until the next periodic review – especially for stations in markets 101 and higher or those in mountainous areas. Block recognizes that replication of service is a critical element but believes that broadcasters already are serving a majority of their population with reduced power facilities and should acquire additional experience with actual DTV operations before expending resources to construct full power facilities. For example, those stations serving mountainous areas with centralized populations operate quite well at low power, and increasing DTV power would not result in significant service area population gains. Deferring action also would help smaller-market stations that have undertaken an expensive DTV build-out to shoulder the burden during a difficult economy. By deferring the replication and maximization deadlines, broadcasters also could direct cost savings toward cultivating and developing innovative DTV services. Given current estimates that the DTV transition could extend well beyond 2006,¹⁶ the Commission will have time in the next periodic review to establish future replication and maximization deadlines as circumstances warrant.

Deferral of the replication and maximization deadlines also is the appropriate solution because much of the FCC regulatory landscape is still in flux. For example, the Commission has

¹⁵ Notice, ¶ 33.

¹⁶ See, e.g., U.S. General Accounting Office, Additional Federal Efforts Could Help Advance Digital Television Transition, GAO-03-7 (Nov. 2002); Bill McConnell, “GAO to FCC: Pick a DTV Date,” BROADCASTING AND CABLE, p. 24 (Dec. 9, 2002) (stating that the end of the DTV transition could be well beyond 2011).

not yet initiated a rulemaking to establish rules governing the conversion of low power television and translator stations to digital technology, and it is uncertain when such rules ultimately will be adopted. The process of full service replication will be complicated particularly for small market broadcasters in rural and mountainous geographic areas, given that many of these stations currently use translators and low power television stations to provide much of their over the air service. The rural stations not only must plan the construction of full power or maximized DTV facilities but also consider how to deliver their DTV signal to areas currently served by analog translators. Once the rules governing the DTV transition for translators are adopted, broadcasters will need to analyze their DTV operations and, if necessary, make appropriate changes to their business plan before moving forward with full service replication.

Imposition of a deadline at this time, when no evidence of a market failure exists, is premature. As the Commission has observed, stations will replicate and maximize as a result of market forces in the absence of a regulatory deadline:

Although we have declined to make full signal replication mandatory, we continue to believe that most DTV broadcasters eventually will replicate their NTSC service areas with DTV service... Once stations commence at least the minimum level of digital service, we believe that DTV set penetration levels will increase, thereby driving demand for digital programming and providing broadcasters with an incentive to expand digital service.”¹⁷

As noted in the last periodic review, by deferring the replication and maximization deadlines the Commission hoped “to permit stations to elect a more gradual build out of their DTV facilities, and thereby increase the number of stations capable of commencing digital service to at least their core communities by the May 2002 and May 2003 construction deadlines.”¹⁸ This

¹⁷ Notice at ¶ 30.

¹⁸ *Id.*

undoubtedly has been the case. During this periodic review, by deferring the replication and maximization deadlines, the Commission can permit stations to experiment with DTV technologies and develop innovative new services. Accordingly, Block urges the Commission to defer a decision on the replication and maximization deadlines until the next DTV periodic review.

B. The Commission Should Give Smaller-Market Stations Discretion to Operate DTV Stations in Prime-Time Only.

The *Notice* proposes that, notwithstanding any modifications to the simulcasting requirements, stations must air a digital signal for at least 50% of the time they air an analog signal.¹⁹ Block requests that the Commission relax this proposal for stations in smaller-markets above 100. Block believes that smaller-market stations which have undertaken DTV construction should be free to tailor their operating hours. Requiring constructed stations to increase operating hours while so many other stations have yet even to complete DTV construction is effectively punishing them for their efforts. This is especially the case given the probability of small market stations obtaining cable carriage of their digital signals, so there is little to be gained from forcing them to operate during hours when over-the-air viewership is minimal. By postponing the date by which smaller-market stations have to expand operating hours, the Commission would help broadcasters who most likely are continuing to pay burdensome DTV construction debts. Such a postponement also would assist those presently unconstructed DTV stations as they are placed into operation. Accordingly, Block requests that the Commission build upon its successful legacy of accommodating smaller-market stations and give them discretion to tailor their DTV schedules beyond the prime-time hours.

¹⁹ *Id.*, ¶ 68. The percentage would increase to 75% in 2004 and 100% in 2005.

III. CONCLUSION

Block urges the Commission to keep these practical considerations in mind and retain its flexible policies toward smaller-market stations to strengthen the likelihood of a successful DTV transition.

Respectfully submitted,

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